

WEIL, GOTSHAL & MANGES LLP  
Stephen Karotkin (*pro hac vice*)  
(stephen.karotkin@weil.com)  
Theodore E. Tsekerides (*pro hac vice*)  
(theodore.tsekerides@weil.com)  
Richard W. Slack (*pro hac vice*)  
(richard.slack@weil.com)  
Jessica Liou (*pro hac vice*)  
(jessica.liou@weil.com)  
Matthew Goren (*pro hac vice*)  
(matthew.goren@weil.com)  
767 Fifth Avenue  
New York, NY 10153-0119  
Tel: 212 310 8000  
Fax: 212 310 8007

JONES DAY  
Bruce S. Bennett (SBN 105430)  
(bbennett@jonesday.com)  
Joshua M. Mester (SBN 194783)  
(jmester@jonesday.com)  
James O. Johnston (SBN 167330)  
(jjohnston@jonesday.com)  
555 South Flower Street  
Fiftieth Floor  
Los Angeles, CA 90071-2300  
Tel: 213 489 3939  
Fax: 213 243 2539

*Attorneys for Shareholder Proponents*

KELLER BENVENUTTI KIM LLP  
Tobias S. Keller (#151445)  
(tkeller@kbbkllp.com)  
Jane Kim (#298192)  
(jkim@kbbkllp.com)  
650 California Street, Suite 1900  
San Francisco, CA 94108  
Tel: (415) 496-6723  
Fax: (415) 636-9251

*Attorneys for Debtors and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**In re:**

**PG&E CORPORATION,**

**- and -**

**PACIFIC GAS AND ELECTRIC  
COMPANY,**

**Debtors.**

- ☐ Affects PG&E Corporation  
☐ Affects Pacific Gas and Electric  
Company  
☒ Affects both Debtors

*\* All papers shall be filed in the Lead  
Case, No. 19-30088 (DM).*

Case No. 19-30088 (DM)

Chapter 11

(Lead Case) (Jointly Administered)

**PLAN PROPONENTS' RESPONSE AND PROPOSAL  
WITH RESPECT TO REMAINING DISPUTES  
WITH CREDITORS' COMMITTEE**

**Relates to Docket No. 8001**

1 The Plan Proponents hereby submit this Response and Proposal in response to the Court's  
2 directions in the *Memorandum Decision – Confirmation of Debtors' and Shareholder Proponents'*  
3 *Joint Chapter 11 Plan of Reorganization*, entered on June 17, 2020 [Docket No. 8001] (the  
4 "**Memorandum Decision**").

5 **I. RESPONSE**

6 As directed in the Memorandum Decision, the Plan Proponents and the Official Committee  
7 of Unsecured Creditors (the "**Creditors' Committee**") have met and conferred on the two issues  
8 noted by the Court, but were not able to achieve a consensual resolution of either issue.

9 The following is the Plan Proponents' position and recommendation as to how these matters  
10 should be addressed in the Plan and the Confirmation Order.

11 1. *Section 8.2(e) of the Plan and Corresponding Paragraph 34(d) of the Confirmation*  
12 *Order.*

13 As the Court is aware and as reflected in the draft *Debtors' and Shareholder Proponents*  
14 *Joint Chapter 11 Plan of Reorganization* (the "**Plan**") and the draft Confirmation Order filed by the  
15 Plan Proponents on June 14, 2020, the Plan Proponents modified Section 8.2(e) of the Plan and  
16 Paragraph 34(d) of the Confirmation Order to provide as follows:

17 Assumption or assumption and assignment of any executory contract  
18 or unexpired lease pursuant to the Plan or otherwise shall result in the  
19 full release and satisfaction of any Claims ~~and Causes of Action~~  
20 against any Debtor or defaults by any Debtor arising under any  
21 assumed executory contract or unexpired lease at any time before the  
22 date that the Debtors assume or assume and assign such executory  
23 contract or unexpired lease, whether monetary or nonmonetary,  
24 ~~including all Claims arising under sections 503(b)(9) or 546(e) of the~~  
25 ~~Bankruptcy Code, any defaults of provisions restricting the change in~~  
26 ~~control or ownership interest composition, or any other bankruptcy-~~  
27 ~~related defaults. Any proofs of Claim filed with respect to an~~  
28 ~~executory contract or unexpired lease that has been assumed or~~  
~~assumed and assigned shall be deemed disallowed and expunged,~~  
~~without further notice to or action, order, or approval of the~~  
~~Bankruptcy Court.~~ to the fullest extent permitted under applicable law.

26 In its last submission on that modification, the sole issue raised by the Creditors' Committee  
27 was the inclusion of the words "of any Claims" in the above paragraph. *See The Official Committee*  
28

1 of *Unsecured Creditors' Statement in Response to Plan Proponents' Response and Proposed*  
2 *Modifications* [Docket No. 7896] at 2:17.

3 To finally resolve this issue, the Plan Proponents will agree to delete the words "Claims  
4 against any Debtor or."

5 Moreover, it is important to note two critical matters with respect to section 365 of the  
6 Bankruptcy Code. First, section 1124 of the Bankruptcy Code has no applicability to section 365.  
7 Section 1124 deals with the treatment of claims or interests, not the assumption or rejection of  
8 executory contracts. In fact, consistent therewith, there is no reference to section 1124 in section  
9 365(b).

10 Second, cure under section 365 is not limited to monetary defaults. The case law in this  
11 District plainly recognizes this. *Arriva Pharms., Inc. v. Lezdey (In re Arriva Pharms., Inc.)*, 456  
12 B.R. 419 (Bankr. N.D. Cal. 2011).

13 Section 365 of the Bankruptcy Code provides as follows:

14 If there has been a default in an executory contract or unexpired lease  
15 of the debtor, the trustee may not assume such contract or lease unless,  
16 at the time of assumption of such contract or lease, the trustee--

17 (A) cures, or provides adequate assurance that the trustee will  
18 promptly cure, such default other than a default that is a breach of a  
19 provision relating to the satisfaction of any provision (other than a  
20 penalty rate or penalty provision) relating to a default arising from any  
21 failure to perform *nonmonetary obligations under an unexpired lease*  
22 *of real property*, if it is impossible for the trustee to cure such default  
23 by performing nonmonetary acts at and after the time of assumption,  
24 except that if such default arises from a failure to operate in  
25 accordance with a nonresidential real property lease, then such default  
26 shall be cured by performance at and after the time of assumption in  
27 accordance with such lease, and pecuniary losses resulting from such  
28 default shall be compensated in accordance with the provisions of this  
paragraph;

(B) compensates, or provides adequate assurance that the trustee will  
promptly compensate, a party other than the debtor to such contract or  
lease, for any actual pecuniary loss to such party resulting from such  
default; and

(C) provides adequate assurance of future performance under such  
contract or lease.

1 11 U.S.C. § 365(b)(1) (emphasis supplied).

2 The above provisions are not limited to monetary defaults in connection with the assumption  
3 of executory contracts. In fact, the word “monetary” does not even appear. Further, the only  
4 mention of nonmonetary defaults with respect to cure is solely with respect to unexpired leases of  
5 real property in the limited context where the nonmonetary default essentially is incapable of being  
6 cured. Obviously, Congress in enacting section 365 of the Bankruptcy Code knew how to carve out  
7 nonmonetary defaults from cure of unexpired leases and could have done so with respect to the cure  
8 of executory contracts if that was its intent. It did not.

9 *Arriva* is directly on point. In ruling on whether a pre-assumption claim for the breach of a  
10 patent license had to be raised in connection with the debtor’s assumption, the Court could not have  
11 been clearer:

- 12 • “The cure requirement applies to both *monetary and nonmonetary* defaults.” *In re*  
13 *Arriva Pharms. Inc.*, 456 B.R. at 423-24 (emphasis supplied).
- 14 • “The burden is on the non-debtor party to assert *any* defaults prior to the debtor’s  
15 assumption of the executory contract.” *Id.* at 424 (emphasis supplied).
- 16 • “The non-bankruptcy party to the lease has the burden to assert any defaults prior to  
17 [assumption and] assignment. When that party has knowledge of facts sufficient to  
18 give the party notice of a pre-petition claim prior to assumption, claim preclusion bars  
19 that party’s later assertion of a claim based upon a prepetition breach.” *Id.* (quoting *In*  
20 *re Hathaway*, 401 B.R. 477, 484 (Bankr. W.D. Wash. 2009)).

21 The *Arriva* Court appropriately noted the intent and purpose of the executory contract cure  
22 provision in section 365 of the Bankruptcy Code:

23 To put it simply, the [non-debtor party] may not “lie in wait” by failing  
24 to allege prior to the time [the debtor] assumed the Protease License  
25 that [the debtor] breached the Protease License by applying for the  
26 patents at issue in its own name, and then turn around, after [the  
27 debtor] assumed the Protease License, and bring a claim against [the  
28 debtor] that is necessarily grounded on [the debtor’s] alleged prior  
breach.

29 *In re Arriva Pharms., Inc.*, 456 B.R. at 427. The Plan Proponents’ prior language was entirely  
30 consistent with these well-settled principles, indeed, the same principles articulated by the Court at  
31 the Confirmation Hearing.

1           Nevertheless, to bring this matter to a final resolution, the Plan Proponents will delete the  
2 reference to “Claims” in the Plan and Confirmation Order despite the fact that it is entirely consistent  
3 with the Bankruptcy Code generally and section 365 specifically. Thus, Section 8.2(e) of the Plan  
4 and Paragraph 34(d) of the Confirmation Order would provide as follows:

5                       Assumption or assumption and assignment of any executory contract  
6                       or unexpired lease pursuant to the Plan or otherwise shall result in the  
7                       full release and satisfaction of any defaults by any Debtor arising  
8                       under any assumed executory contract or unexpired lease at any time  
9                       before the date that the Debtors assume or assume and assign such  
                      executory contract or unexpired lease, whether monetary or  
                      nonmonetary, to the fullest extent permitted under applicable law.

10           2.       *Fire Claim.*

11           As the Court expressly noted in its Memorandum Decision, “[t]he definition [of ‘Fire Claim’]  
12 is clear.” Memorandum Decision at 20. Accordingly, there is no reason to predetermine what  
13 particular claim does or does not constitute a Fire Claim. The facts and circumstances of each claim  
14 are unique and the determination should be made in that context and at the time, if any, that a dispute  
15 arises.

16           Nevertheless, the Plan Proponents will add a provision to the Confirmation Order as follows,  
17 that tracks the Court’s Memorandum Decision verbatim:

18                       A claim asserted by a provider of goods and services, whether or not a  
19                       counterparty to an assumed executory contract, that suffered damages  
20                       from the Fires (as defined in Section 1.86 of the Plan), is impaired and  
21                       should be channeled to the Fire Victim Trust. If its damages were not  
22                       caused by or “in any way arising out of the Fires” (*See* Section 1.78 of  
                      the Plan), but arise out of the rejection of an executory contract or are  
                      part of the cure of an assumed one, they should be dealt with under  
                      Article VIII of the Plan and section 365 of the Bankruptcy Code.

23           No more precise formulation is possible in the absence of specific facts. The Court’s  
24 formulation provides appropriate guidance that will be helpful if a controversy ever arises. Any  
25 attempt to legislate a solution now in the absence of a live controversy would be antithetical to the  
26 carefully crafted provisions of the Plan.

1           The Plan Proponents have gone out of their way to address legitimate objections. This  
2 exercise should not devolve to modifications that leverage one constituency's position to the  
3 detriment of all other parties in interest.

4 **II. CONCLUSION**

5           The Plan Proponents' proposed further modifications should be implemented and the  
6 remaining objections should be overruled.

7  
8 Dated: June 19, 2020

**WEIL, GOTSHAL & MANGES LLP**  
**KELLER BENVENUTTI KIM LLP**

*/s/ Stephen Karotkin*

Stephen Karotkin

*Attorneys for Debtors and Debtors in Possession*